Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

V.M. WHEELER III, Petitioner

v.

KIDDER, PEABODY & CO., INCORPORATED

and

GENERAL ELECTRIC COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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Pro Se

QUESTIONS PRESENTED

1. Whether an arbitration provision, otherwise enforceable in accordance with the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 2, is unenforceable and void for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, when such provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract between parties far from equal in bargaining power, where such contract is presented to an officer of a corporation by his employer as a condition of his employment prior to any controversy arising, where there is no opportunity for the individual to negotiate over the terms of such contract, and where the individual has no choice other than to accept the contract as written.

2. Whether the lower courts erred in the application of Texas state law in dismissing Petitioner's Federal suit on grounds of collateral estoppel and by applying the doctrine of res judicata to an interlocutory order of the Texas state court.

3. Whether the lower courts sanctioned a departure by the Texas state court from the accepted and usual course of judicial proceedings in its denial to Petitioner of his statutory right to a jury trial on issues relating to the making of a purported arbitration agreement.

PARTIES TO THIS ACTION

The parties to these proceedings are the petitioner, V.M. Wheeler III, and the respondents, Kidder, Peabody & Co., Incorporated, and General Electric Company.

TABLE OF CONTENTS

I. Questions Presented i

II. Parties To This Action ii

III. Opinions Below 1

IV. Jurisdiction 2

V. Constitutional And Statutory Provisions Involved 2

VI. Statement Of The Case 3

VII. Reasons For Granting The Writ

A. The Arbitration Provision Upon Which Respondents Rely Is Unenforceable And Void For Public Policy Under The Seventh Amendment To The United States Constitution, As The Purported Waiver Of Petitioner's Right To Jury Trial Was Not Validly Obtained By Respondents 4

B. The Lower Courts Erred In The Application Of Texas State Law In Dismissing Petitioner's Federal Suit On Grounds Of Collateral Estoppel 6

C. The Lower Courts Sanctioned A Departure By The Texas State Court From The Accepted And Usual Course Of Judicial Proceedings By Denying Petitioner His Statutory Right To Jury Trial On Issues Relating To The Making Of The Purported Arbitration Agreement 8

VIII. Conclusion 9

IX. Appendices

Order Of The Supreme Court Of The United States ..... A
Opinion Of The United States Court Of Appeals
For The Fifth Circuit ..... B
Order Of The United States Court Of Appeals
For The Fifth Circuit C
Order Of Dismissal By The United States District
Court For The Southern District Of Texas,
Houston Division ..... D
Seventh Amendment To The United States
Constitution, U.S.C.A. Const. Amend VII ..... E
9 U.S.C.A. Section 4 ..... F

TABLE OF AUTHORITIES

Cases

Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern., 373 F.2d 136 (8th Cir. 1967), certiorari denied, 389 U.S. 827, 88 S.Ct. 77, 19 L.Ed2d 83 5
Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882) 5
Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937) 5
National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977) 5
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) 5
Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) 5
K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) 5
Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 7
Anglin Co., Inc. v. Arthur Tipps, 842 S.W.2d 266 (Tex. 1992) 7
Homeright Co. v. Exchange Warehouses, Inc., 526 S.W.2d 241, 246 (Tex. App. - Tyler 1975, writ ref. n.r.e.) 7
Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976) 7
McCormick v. Guillot, 597 S.W.2d 345, 346 (Tex. 1980) 7
Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985) 8

Constitutional Provision

United States Constitution, Amendment VII 2, 4, 6

Statutes And Rules

Local Rule 47.5.1 1
28 U.S.C.A. Section 1331 2
15 U.S.C.A. Section 1, et. seq 2
18 U.S.C.A. Section 1961, et. seq 2
28 U.S.C.A. Section 1332 2
28 U.S.C.A. Section 1291 2
28 U.S.C.A. Section 1254(1) 2
9 U.S.C.A. Section 4 ..... 2, 8, 9
9 U.S.C.A. Section 1, et seq 6
Tex. R. Civ. P. 162 ..... 4, 8

No. _____

IN THE
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October Term, 1993

V.M. WHEELER III, Petitioner
v.
KIDDER, PEABODY & CO., INCORPORATED
and
GENERAL ELECTRIC COMPANY, Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

Petitioner, V.M. Wheeler III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit").

OPINIONS BELOW

An Order extending the time for filing of this Petition For Writ Of Certiorari to April 22, 1994, was entered by this Court on February 9, 1994. The Order is reproduced in the Appendix. (App. A)

The Opinion of the Fifth Circuit was entered on October 26, 1993. Pursuant to Local Rule 47.5.1, the Opinion was not published. The Opinion is reproduced in the Appendix. (App. B)

Petitioner's Petition For Rehearing by the Fifth Circuit was denied on November 23, 1993. The Order of the Fifth Circuit is reproduced in the Appendix. (App. C).

An Order Of Dismissal by the United States District Court for the Southern District of Texas, Houston Division (the "District Court"), was rendered on October 13, 1993. The Order of Dismissal is reproduced in the Appendix. (App. D)

JURISDICTION

The District Court has original Federal question jurisdiction under 28 U.S.C.A. Section 1331 over the causes of action in Petitioner's Federal suit under the Sherman Act, 15 U.S.C.A. Section 1, et seq., and the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.A. Section 1961, et. seq. The District Court has jurisdiction over the state causes of action under the doctrine of pendant jurisdiction and also under 28 U.S.C.A. Section 1332, because the suit is between citizens of different states and the jurisdictional amount is satisfied.

The Fifth Circuit has jurisdiction over Petitioner's appeal under 28 U.S.C.A. Section 1291. A final decision dismissing Petitioner's suit was entered by the District Court.

The judgment of the Fifth Circuit was entered on October 26, 1993. A timely Motion For Rehearing was filed with the Fifth Circuit, which Motion was denied on November 23, 1993. An Order extending the time for filing of this Petition For Writ Of Certiorari to April 22, 1994, was entered by this Court on February 9, 1994. This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition For Writ of Certiorari involves the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, and certain provisions of the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4, copies of which are reproduced in the Appendix. (App. E and F, respectively).

STATEMENT OF THE CASE

Petitioner was a vice-president of respondent, Kidder, Peabody & Co., Incorporated ("Kidder"), hired in April 1990 to work in the areas of investment banking and corporate finance. Although he was not a stockbroker, as a condition of employment, Petitioner was required to sign a "Form U-4" Uniform Application of Registration (the "U-4") with the New York Stock Exchange. Buried in fine print among multiple, pre-printed pages of the standardized U-4 was an arbitration clause, which provides,

> I agree to arbitrate any dispute, claim or controversy, that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Petitioner became dissatisfied with Kidder's policies and expressed his intention to leave the firm. Kidder allegedly made an oral agreement with Petitioner that if he would complete a major project on which he was working, Kidder would treat him fairly in the future and not discharge him until a reasonable time after the completion of the transaction. Immediately following the close of the transaction, however, Kidder terminated Petitioner's employment, allegedly depriving him of the bonus he would have received for his work during that calendar year.

On September 17, 1991, Petitioner filed suit in Texas state court against Kidder and Nancy Quinn, a corporate officer, alleging fraud, defamation, intentional infliction of emotional distress and quantum meruit. Respondents filed a motion to stay the proceedings and to compel arbitration. A hearing was held on January 31, 1992, in which the court denied Petitioner's motion to compel discovery, which he claimed would prove the invalidity of the arbitration clause. The court also indicated that it would sign an interlocutory order staying the proceedings.

Respondents contend that the court actually issued its order at that hearing and did not merely express an intent to do so in the

future. The docket indicates a January 31, 1992, order to compel arbitration. On February 6, 1992, Petitioner moved to dismiss his suit voluntarily without prejudice pursuant to Tex. R. Civ. P. 162. Despite the nonsuit, the state judge signed an order on March 3, 1992, ordering arbitration.

On June 8, 1992, Petitioner filed an action in the District Court against Kidder and respondent, General Electric Company ("GE"), the parent corporation of Kidder, alleging fraud in the inducement of the arbitration agreement, antitrust violations, civil Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, defamation, intentional infliction of emotional distress, debt and quantum meruit. Respondents moved to compel arbitration, and GE moved to dismiss the RICO claim for failure to plead with particularity. On October 13, 1992, the District Court sua sponte dismissed Petitioner's suit on the grounds of comity and judicial economy.

Petitioner appealed to the Fifth Circuit. On October 26, 1993, the Fifth Circuit affirmed the Order of Dismissal by the District Court, and on November 23, 1993, the Fifth Circuit denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

A.

THE ARBITRATION PROVISION UPON WHICH RESPONDENTS RELY IS UNENFORCEABLE AND VOID FOR PUBLIC POLICY UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS THE PURPORTED WAIVER OF PETITIONER'S RIGHT TO JURY TRIAL WAS NOT VALIDLY OBTAINED BY RESPONDENTS

The Seventh Amendment to the United States Constitution guarantees citizens the right of trial by jury in suits at common law, where the amount in controversy exceeds twenty dollars. U.S.C.A. Const. Amend. VII While the right to jury trial may be waived,

Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern., 373 F.2d 136 (8th Cir. 1967), certiorari denied, 389 U.S. 827, 88 S.Ct. 77, 19 L.Ed2d 83, it generally is recognized that courts must indulge every reasonable presumption against waiver of this fundamental guaranty of the rights and liberties of American citizens. Hodges v. Easton, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882); Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937)

Contractual jury waiver provisions are enforceable only if entered into knowingly and intentionally. National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977)

Consistent with the reasoning of this Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), in which it refused to uphold a contractual provision waiving due process rights (noting that there was "no showing whatever that the Appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights"), at least two Federal Circuit Courts of Appeals have shifted the burden to those parties seeking enforcement of waivers of rights to trial by jury to prove that the consent of the party against whom such waiver is sought to be enforced was both voluntary and informed. Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986); National Equipment Rental, *supra*. Conversely, the evidentiary burden has been shifted in the Sixth Circuit to those parties who seek to avoid a waiver to prove that consent to the waiver was not knowing and voluntary. K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985)

In National Equipment Rental, *supra*, a controversy analogous to that of the Petitioner, the Second Circuit considered the issue of jury trial waivers buried in fine print within multiple clause agreements. In that case, the Second Circuit, noting the gross inequality of the parties' bargaining power and that the party against whom enforcement of the waiver was sought had no choice other than to accept the contract as written, held that a waiver of an individual's right to trial by jury buried in the eleventh paragraph of a fine print, sixteen clause agreement does not constitute knowing and intentional waiver of this right.

It is undisputed that the amount in controversy in these proceedings exceeds the amount provided for under the Seventh Amendment. Petitioner has maintained throughout these proceedings that any purported waiver of his right to jury trial was involuntary, uninformed, unintentional and unknowing. Furthermore, Petitioner consistently has asserted that such purported waiver constituted one clause buried in fine print among multiple, pre-printed pages of the standardized U-4 which was presented to Petitioner as a condition of employment following his resignation from his prior employer and immediately upon his joining Kidder; that the U-4 represented merely one of many documents presented to Petitioner for his signature in the flurry of paperwork associated with various personnel papers hurriedly submitted to Petitioner at Kidder; that he was not afforded the opportunity to negotiate the terms of the contract; that the arbitration provision was neither bargained for nor discussed in connection with the execution of these documents; and that he had no choice other than to accept the contract as written.

While Petitioner has never challenged, and does not challenge, the Constitutionality of the Federal Arbitration Act, 9 U.S.C.A. Section 1, et seq., the effectiveness of waivers of individuals' rights to jury trial which are properly obtained through the valid consent of parties against whom such waivers are sought to be enforced, or the validity of the purported contract as a whole, Petitioner respectfully submits that the purported waiver of his right to jury trial in question in these proceedings falls far short of the Constitutional safeguards which have been adopted by this Court and other Federal courts of this land.

B.

THE LOWER COURTS ERRED IN THE APPLICATION OF TEXAS STATE LAW IN DISMISSING PETITIONER'S FEDERAL SUIT ON GROUNDS OF COLLATERAL ESTOPPEL AND BY APPLYING THE DOCTRINE OF RES JUDICATA TO AN INTERLOCUTORY ORDER OF THE TEXAS STATE COURT

The Fifth Circuit correctly states that, in applying the doctrine of collateral estoppel, Federal courts must apply the law of the state

from which the judgment emerged. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984)

Petitioner respectfully submits that the Fifth Circuit misapplied Texas state law in two respects.

First, the Fifth Circuit holds (i) that the state court order compelling arbitration represented a final adjudication of the issue of arbitrability and (ii) that the Petitioner was collaterally estopped from challenging the arbitrability of the purported agreement between Petitioner and Kidder.

In Anglin Co., Inc. v. Arthur Tipps, 842 S.W.2d 266 (Tex. 1992), the Supreme Court of Texas held expressly that an order relating to arbitration under the Federal Arbitration Act is not a final judgment under Texas state law. Similarly under Texas state law, a final judgment is required to establish res judicata and, hence, collateral estoppel. See, Homeright Co. v. Exchange Warehouses, Inc., 526 S.W.2d 241, 246 (Tex. App. - Tyler 1975, writ ref. n.r.e.) In Homeright, supra, the Texas court of appeals specifically addressed the effect of interlocutory decrees and held that an interlocutory decree entered prior to a nonsuit does not support res judicata or collateral estoppel.

Second, Petitioner respectfully submits that the Fifth Circuit applied the wrong precedent in adjudicating the validity of the state court order in respect to the nonsuit procedure, a convention under Texas state law but which does not exist in the Federal courts.

In support of its conclusion that the docket entry of January 31, 1992, was an order of the state court issued at a hearing, the Fifth Circuit sites a decision in 1976 of the Supreme Court of Texas, namely, Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976). In 1980, however, the Supreme Court of Texas held expressly, in McCormick v. Guillot, 597 S.W.2d 345, 346 (Tex. 1980), that oral rendition of a judgment supported by a court's docket sheet is insufficient for purposes of establishing a judgment. This decision is consistent with the long line of cases on this issue in Texas.

In the instant matter, Petitioner moved to dismiss his state court suit voluntarily pursuant to Tex. R. Civ. P. 162. Despite this nonsuit, the state court judge signed an order following Petitioner's nonsuit, ordering arbitration. Petitioner respectfully submits (i) that the Fifth Circuit incorrectly applied Texas state law in sustaining the validity of the March 3, 1992, written order of the state court, as the same was entered subsequent to the nonsuit by Petitioner and (ii) that the Fifth Circuit incorrectly applied Texas state law in holding (a) that the interlocutory state order compelling arbitration represented a final adjudication of the issue of arbitrability and (b) that the Petitioner was collaterally estopped from challenging the arbitrability of the purported agreement between Petitioner and Kidder.

C.

THE LOWER COURTS SANCTIONED A DEPARTURE BY THE TEXAS STATE COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY DENYING PETITIONER HIS STATUTORY RIGHT TO JURY TRIAL ON ISSUES RELATING TO THE MAKING OF THE PURPORTED ARBITRATION AGREEMENT

Petitioner challenges the validity of the purported arbitration agreement on several grounds. Petitioner acknowledges that he bears the burden of showing that he is entitled to a jury trial under the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4. Petitioner believes that he met this burden by demonstrating in the District Court that, under prevailing law, he would be relieved from his obligations if his allegations prove true.

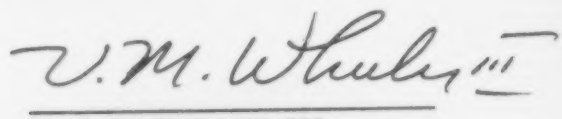
In reviewing this issue in other circuits, the Seventh Circuit has held that, although the Federal Arbitration Act, specifically 9 U.S.C.A. Section 4, speaks only of challenges to "the making" of the agreement to arbitrate, the term encompasses any challenge to the validity of the agreement, even if there is no disagreement that it was "made." Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985)

By dismissing Petitioner's case on grounds of comity and judicial economy, the lower courts did not expressly rule on Petitioner's request for a jury trial. Petitioner respectfully submits that the lower courts erred in dismissing his case, because Petitioner demonstrated that he is entitled to a jury trial under the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 4, on the question of whether the purported arbitration agreement is void, or revocable, under law or equity.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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PETITION FOR WRIT OF CERTIORARI
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For The Fifth Circuit

AFFIDAVIT OF SERVICE TO OPPOSING COUNSEL

I, V.M. Wheeler III, hereby certify that on the 21st day of April, 1994, I deposited three true and correct copies of the foregoing in the United States mail, postage prepaid to each of the following:

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SUPREME COURT OF THE UNITED STATES

No. A-667

V.M. Wheeler,

Petitioner

v.

Kidder, Peabody & Company, Inc., et al.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 22, 1994.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of February, 1994.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2930
Summary Calendar

V.M. WHEELER, III,

Plaintiff-Appellant,

VERSUS

KIDDER PEABODY & COMPANY, INC.,
and GENERAL ELECTRIC COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 92 1696)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

V.M. Wheeler, III, a former employee of Kidder Peabody & Company, Inc. ("Kidder"), appeals the district court's dismissal of his suit against Kidder and General Electric Company ("GE") for alleged

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*Local Rule 47.5.1 provides; "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

civil Racketeer Influenced and Corrupt Organizations Act ("RICO") and antitrust violations. Concluding that Wheeler's claims are barred by a prior state court ruling compelling arbitration of these claims, we affirm.

I.

Wheeler was a vice-president of Kidder, hired in April 1990 to work in the areas of investment banking, mergers, acquisitions, and corporate finance. Although he was not a stockbroker, as a condition of employment Wheeler was required to sign a "Form U-4" Uniform Application of Registration with the New York Stock Exchange. The U-4 contains an arbitration clause, which provides,

> I agree to arbitrate any dispute, claim or controversy, that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Wheeler became dissatisfied with Kidder's policies and expressed his intention to leave the firm. Kidder allegedly made an oral agreement with Wheeler that if he would complete a major project that he was working on, Kidder would treat him fairly in the future and not discharge him until a reasonable time after the completion of the deal. Immediately following the close of the deal, however, Kidder terminated Wheeler's employment, allegedly depriving him of the bonus he would have received from his work on that deal.

II.

A.

On September 17, 1991, Wheeler filed suit in state court against Kidder and Nancy Quinn, a corporate officer, alleging fraud, defamation, intentional infliction of emotional distress, and quantum meruit. The defendants filed a motion to stay the proceedings and to compel arbitration. A hearing was held on January 31, 1992, in which the court denied Wheeler's motion to compel discovery, which he claimed would prove the invalidity of the arbitration agreement.

The court also indicated that it would sign an interlocutory order staying the proceedings.

The defendants contend that the court actually issued its order at that hearing and did not merely express an intent to do so in the future. The docket indicates a January 31, 1992, order to compel arbitration. On February 6, 1992, Wheeler moved to dismiss his suit voluntarily without prejudice pursuant to Tex. R. Civ. P. 162. Despite the nonsuit, the state judge signed an order on March 3, 1992, ordering arbitration. The docket indicates, "3-2-92 Order re 1-31-92 Order."

B.

On June 8, 1992, Wheeler filed this action in federal court against Kidder and GE, alleging fraud in the inducement of the arbitration agreement, antitrust violations, RICO violations, defamation, intentional infliction of emotional distress, debt, and quantum meruit. The defendants moved to compel arbitration, and GE moved to dismiss the RICO claim for failure to plead with particularity.[1] On October 13, 1992, the district court sua sponte dismissed Wheeler's suit on the grounds of comity and judicial economy, stating that the "spirit of the order entered in state court must be respected."

III.

We review an order enforcing a state order compelling arbitration for abuse of discretion. C.G. Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1161 (5th Cir. 1992). We need not reach the merits of the arbitrability of the claims, however; since the claims were dismissed on the grounds of comity and judicial economy, the only issue presented is whether Wheeler was entitled to pursue his claims in federal court.

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[1]Kidder was not named as a defendant in one of the RICO claims against GE, as Wheeler alleged that Kidder was the enterprise through which GE engaged in acts of racketeering.

A.

An order of a state court compelling arbitration must be given full faith and credit by a federal court. Allen v. McCurry, 449 U.S. 90 (1980). In determining the preclusive effect of a prior state court judgment, federal courts must apply the law of the state from which the judgment emerged. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); J.M. Muniz, Inc. v. Mercantile Tex. Credit Corp., 833 F.2d 541, 543 (5th Cir. 1987).

The doctrine of collateral estoppel has the purposes of protecting litigants "from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation." Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). This circuit requires "judicial finality" before collateral estoppel can be invoked; nevertheless, "finality" does not require a final judgment, but only that the issue has been "fully litigated." Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1190-91 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983).

The controlling issue is whether the state court's order compelling arbitration was effective at the January 31 1992, hearing, or not until March 3, 1992, the date of the signed order.[2] For the order to have

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[2]Had Wheeler dismissed his claim before the state court order was entered, and if the motion to compel arbitration were not a claim for affirmative relief, the state court would have been divested of jurisdiction and the order would have been invalid. According to Tex. R. Civ. P. 162, a party who voluntarily dismisses his suit does not prejudice his right to bring suit again on the same issues. Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453, 457 (5th Cir. 1987). A plaintiff has an absolute, unqualified right to take a nonsuit upon timely motion as long as the defendant has not made a claim for affirmative relief. McQuillen v. Hughes, 626 S.W.2d 495, 496 (Tex. 1981) (per curiam).

Since Wheeler asserted federal questions in his complaint, namely violations of the Sherman Act, 15 U.S.C. Section 1, and RICO, 18 U.S.C. Section 1961, the federal district court would have jurisdiction over his action pursuant to 28 U.S.C. Section 1331. Furthermore, the federal district court would have jurisdiction over the state claims through supplemental jurisdiction. As Wheeler correctly notes, a federal court has "no more right to decline the exercise of

been effective on January 31, the judge must have made a specific order, not merely expressed his intention to make the order at some future time.

> The judge's intention to render a judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. The opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination. Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words . . . and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment.

Reese v. Piperi, 534 S.W.2d 329, 330 (Tex. 1976).

The January 31 hearing was not transcribed. Nevertheless, the docket entry indicates that an order was issued at that hearing, compelling arbitration. Although a docket entry may not take the place of a separate order of judgment, see First Nat'l Bank v. Birnbaum, 826 S.W.2d 189, 190 (Tex. App.-Austin 1992, no writ) (per curiam), here the docket entry reflected a valid order of the court made at the hearing. Thus, Wheeler's attempted nonsuit cannot abrogate the effect of the state court's order compelling arbitration. Nor are we convinced that the state court motion to compel arbitration was not properly regarded as a claim for affirmative relief.

B.

For the doctrine of collateral estoppel to apply, a party must establish that (1) the facts sought to be litigated in the second action

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jurisdiction which is given, than to usurp that which is not given." Thomas, 807 F.2d at 454 (citation omitted).

were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action. Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). The issue that Wheeler has been collaterally estopped from relitigating is the validity of the arbitration agreement. First, the issue was fully litigated in state court: A motion to compel arbitration was made by Kidder; Wheeler filed a response opposing the motion; and a hearing was held. Second, the validity of the arbitration agreement was obviously the only issue relevant to the motion to compel arbitration. And third, the parties were identical and, therefore, cast as adversaries.

Wheeler claims that even if collateral estoppel precludes claims against Kidder on issues raised in state court, dismissal was inappropriate for new causes of action brought in federal court and for claims against GE, which was neither a party to the prior lawsuit nor a party to the arbitration agreement. The fact that Wheeler now asserts new causes of action is irrelevant, however. Collateral estoppel precludes relitigation of issues, not claims. The validity of the arbitration agreement has been fully litigated; new causes of action arising out of the same set of operative facts will also be precluded. Wilhite v. Adams, 640 S.W.2d 875, 876 (Tex. 1982); Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 362 (Tex. 1971).

Wheeler cannot complain of GE's use of collateral estoppel. The only party that may object to collateral estoppel is the one who (1) is being collaterally estoppel from litigating an issue and (2) has not already litigated the issue. But Wheeler has already litigated the issue. Any party sharing Kidder's interest in the issue could defensively estop Wheeler from relitigating it. See Restatement (Second) Of Judgments Section 27 cmt. c (1982).

Furthermore, the fact that GE was not technically a party to the arbitration agreement is not fatal. As another court said in J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988), "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." See

also Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976).

Therefore, Wheeler is precluded from relitigating the issue of the validity of the arbitration agreement. The effect of this preclusion is that Wheeler may not sue Kidder or GE, or anybody else for that matter, in state or federal court for any claims arising out of his employment with Kidder. He must arbitrate his claims.

IV.

The parties have already litigated the issue of arbitrability in state court. That court entered a valid order compelling arbitration. A federal court must give full faith and credit to state court orders; therefore, the district court did not err in dismissing Wheeler's suit.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2930

V.M. WHEELER, III,

Plaintiff-Appellant,

versus

KIDDER PEABODY & COMPANY, INC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(November 23, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT;

/s/ Jerry E. Smith
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

V.M. WHEELER, III,
Plaintiff

VS.

CIVIL ACTION NO. H-92-1696

KIDDER, PEABODY & CO., INCORPORATED AND GENERAL ELECTRIC COMPANY,
Defendants

ORDER OF DISMISSAL

Pending before the Court is the defendant's, Kidder, Peabody & Co., motion to compel arbitration and the defendant's, General Electric Company, motion to dismiss. The Court having reviewed same is of the opinion that the motions are meritorious. However, the Court chooses to sua sponte dismiss the case for other reasons stated herein.

Litigation History:

In 1991, the plaintiff filed a suit in state court against his former employer, Kidder, Peabody and Nancy Quinn under Cause No. 91-047995 in that state court. The subject matter of that suit is essentially the same as that in this suit. At the conclusion of a hearing on Kidder, Peabody's motion to compel arbitration, the state trial judge ordered the parties to proceed to arbitration pursuant to Article VIII, Section 1 of the American Stock Exchange Constitution. Before the order could be formerly entered, the plaintiff non-suited the case. The docket sheet, however, reflects the order of the court. Thereafter, the same plaintiff brought this suit in federal court, and filed another suit in state court naming only Nancy Quinn as a defendant. In the case at bar, the plaintiff has alleged claims arising

out of his employment relationship with Kidder, Peabody. But, in addition to those claims, the plaintiff asserts Sherman Act and RICO violations against Kidder, Peabody.

It is apparent to the Court that the plaintiff non-suited the first state court action in a deliberate attempt to avoid the state court's order to proceed to arbitration. Therefore, this Court will look to the employment agreement for the sole purpose of determining whether, in the interest of justice and comity this suit should be dismissed.

In determining whether parties are required to arbitrate an employment dispute, the Court must look to the agreement to determine the nature and scope of the agreement. Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1050 (2nd Cir. 1989).

The agreement between the parties states in relevant part:

> "I agree to arbitrate any dispute claim or controversy that may arise between me and my firm, ... that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register ..."

Article VIII, Section 1 of the ASE Constitution provides that:

> "Members, member firms, partners of firms, member corporations and officers of member corporation shall arbitrate all controversies arising in connection with their business between or among themselves ..."

* * *

Read together, these provisions require the parties to arbitrate employment disputes as well as other disputes. In recalling the arguments made in open Court, the Court concludes that there is no dispute that an arbitration agreement exists. The question is whether it should be enforced.

Arbitration agreements are favored in the law and unless the agreement is not susceptible of a reasonable interpretation, or the enforcement nullify other more important federal policies, doubts should be resolved in favor of arbitration. See Rodriguez DeQuijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989); see also Cowdert v. Paine, Webber, Jackson & Curtis, 705 F.2d 78 (2nd Cir. 1983).

The poignant question, in the Court's view, is whether the plaintiff may circumvent the order of the state court by non-suit and refiling essentially the identical suit in state and federal court. In the Court's view, the plaintiff should not. As far as this Court is concerned, the spirit of the order entered in state court must be respected because the order was not arbitrarily entered. A full and fair hearing was granted and no complaint has been made here concerning the process. Because the issue of arbitration has been litigated, no useful purpose is served in permitting the plaintiff a second day in court. In this regard, Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985) is dispositive of this issue.

For judicial economy and to preserve the integrity of the judicial process, the Court holds that this suit should be dismissed. See Houston North Properties v. White, 731 S.W.2d 719, 722 (Tex. App.--Houston [1st Dist.] 1987).

The defendant, General Electric Company's, motion for sanctions is DENIED.

It is so ORDERED.

Signed this 13th day of October, 1992.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

AMENDMENT VII - CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.C.A. Const. Amend VII

FAILURE TO ARBITRATE UNDER AGREEMENT; PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION; NOTICE AND SERVICE THEREOF; HEARING AND DETERMINATION

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. ***If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default,*** or if the matter in dispute is within admiralty jurisdiction, ***the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may,*** except in cases of admiralty, on or before the return day of the notice of application, ***demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.*** If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and there is a default in proceeding thereunder, the court shall make an order summarily

directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C.A. Section 4 (Emphasis Added)

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1683

In The

Supreme Court of the United States

October Term, 1993

V.M. WHEELER, III,

Petitioner,

v.

KIDDER, PEABODY & CO. INCORPORATED,

and

GENERAL ELECTRIC CO.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

1. Whether an arbitration provision in a Uniform Application For Securities Industry Registration or Transfer Form U-4 ("U-4 Form") that was signed by the petitioner violates petitioner's rights under the Seventh Amendment to the United States Constitution.

2. Whether a state court order compelling petitioner to arbitrate his claims against respondents, made after an evidentiary hearing on the validity and enforceability of an arbitration provision, collaterally estops or otherwise bars petitioner from relitigating these same issues in subsequent suits against respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED .. 5

I. Petitioner Failed to Raise in the Lower Court His Claim That His Seventh Amendment Rights Were Violated 5

II. Petitioner Failed to Raise Any Claims That Are Important or Special 6

III. The District Court Did Not Violate Petitioner's Seventh Amendment Right to a Trial by Jury 8

IV. Petitioner Failed to Produce Sufficient Evidence to Require a Jury Trial on Arbitrability in Any Case 9

V. The Fifth Circuit Did Not Err in Its Application of Texas Law 11

A. The Fifth Circuit Correctly Decided That the Orders in the First Lawsuit Are Enforceable 11

B. The Fifth Circuit Correctly Concluded That Petitioner's Nonsuit Did Not Affect the Validity of the Court's Orders in the First Lawsuit 13

C. The Fifth Circuit Correctly Applied Texas Collateral Estoppel Principles 17

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 4a

TABLE OF AUTHORITIES

Pages

CASES

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1969) 4

Aetna Casualty & Sur. Co. v. Specia, 849 S.W.2d 805 (Tex. 1993) 14, 17

Bailey & Williams v. Westfall, 727 S.W.2d 86 (Tex. App. – Dallas 1987, writ ref'd n.r.e.) 14

Benson v. Wanda Petroleum Co., 468 S.W.2d 361 (Tex. 1971) 17, 18

Bhatia v. Johnston, 818 F.2d 418 (5th Cir. 1987) 10

BHP Petroleum Co. v. Millard, 800 S.W.2d 838 (Tex. 1990) 13

Brightwell v. Rabeck, 430 S.W.2d 252 (Tex. Civ. App. – Fort Worth 1968, writ ref'd n.r.e.) 14

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, *and cert. denied*, 460 U.S. 1013 (1983) 18

City of Bismarck v. Toltz, King, Duvall, Anderson & Assocs., 767 F.2d 429 (8th Cir. 1985) 19

Cluck v. Cluck, 699 S.W.2d 246 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.) 12

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 14

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) 9

Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 4

Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148 (5th Cir. 1992) 8, 9, 10

TABLE OF AUTHORITIES – Continued

Page

E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 6

Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096 (5th Cir. 1986) 9

Falls County v. Perkins & Cullum, 798 S.W.2d 868 (Tex. App. – Fort Worth 1990, no writ) 12

Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989) 7

Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) 7

Houston North Properties v. White, 731 S.W.2d 719 (Tex. App. – Houston [1st Dist.] 1987, writ dism'd) 16

Hurst v. Prudential Securities, Inc., 1994 U.S. App. LEXIS 6940 (9th Cir. 1994) 7

Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985) 17

Kaplan v. First Options of Chicago, Inc., 1994 U.S. App. LEXIS 5975 (3d Cir. 1994) 7

Keene Corp. v. Caldwell, 840 S.W.2d 715 (Tex. App. – Houston [14th Dist.] 1992, no writ) 15

Lamar Savings Ass'n v. White, 731 S.W.2d 715 (Tex. App. – Houston [1st Dist.] 1987, no writ) 16

McGinnis v. E.F. Hutton & Co., Inc., 812 F.2d 1011 (6th Cir. 1987) 7

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 9, 15

TABLE OF AUTHORITIES – Continued

Page

Neal v. Hardee's Food Systems, Inc., 918 F.2d 34 (5th Cir. 1990) 14

Pearce v. E.F. Hutton Group, Inc., 828 F.2d 826 (D.C. Cir. 1987) 7

Price v. Drexel Burnham & Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986) 15

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 10

Reese v. Piperi, 534 S.W.2d 329 (Tex. 1976) 12

Ross v. Moffitt, 417 U.S. 600 (1974) 8

Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877 (9th Cir. 1992) 7

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 9

State v. Approximately $2,000,000 in United States Currency, 822 S.W.2d 721 (Tex. App. – Houston [1st Dist.] 1991, no writ) 13

T&R Enterprises v. Continental Grain Co., 613 F.2d 1272 (5th. Cir. 1980) 10

Wilhite v. Adams, 640 S.W.2d 875 (Tex. 1982) 18

STATUTES AND RULES

9 U.S.C. § 2 14

Fed. R. Civ. P. 9(b) and 11 ..... 3, 4

Sup. Ct. R. 10.1 6

Tex. R. Civ. P. 162 ..... 2, 12, 13, 14

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

ASE Arbitration Rules Article VIII, Section 1 1

ASE Constitution 1

Black's Law Dictionary (5th ed. 1979) 15

Harlan, Justice John M., *Manning the Dikes*, 13 Record of N.Y. Bar Ass'n, 541 8

NASD By-Laws 1

NASD Code of Arbitration, Part I, Section 1 and Part II, Section 8(a) 1

NYSE Arbitration Rules at Article XI, Section 1 1

NYSE Constitution 1

Restatement (Second) of Judgments § 13 (1982) 19

Restatement (Second) of Judgments § 27 (1982) ...17, 18

STATEMENT OF THE CASE

Respondents generally agree with the statement of the case provided by petitioner. However, certain statements by petitioner need to be corrected.

Petitioner is a former employee of Kidder, Peabody & Co. Incorporated ("Kidder"). Petitioner signed a U-4 Form in connection with his employment at Kidder. This suit is the third lawsuit that petitioner has filed against respondents challenging the enforceability of an arbitration provision in his U-4 Form.

The U-4 Form contains the following arbitration provision:

> I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Item 10 of the U-4 Form states that petitioner was registered with the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange ("NYSE"), and the American Stock Exchange ("ASE") as a General Securities Representative. Each of these organizations has rules, constitutions, and by-laws that require petitioner's underlying dispute with respondents to be arbitrated. *See* NASD By-Laws and the NASD Code of Arbitration at Part I, Section 1 and Part II, Section 8(a); NYSE Constitution and the NYSE Arbitration Rules at Article XI, Section 1; ASE Constitution and the ASE Arbitration Rules at Article VIII, Section 1.

In contravention of this arbitration agreement and these exchange rules, petitioner filed three lawsuits

against various combinations of Kidder, General Electric Co. ("GE"), Kidder's parent corporation, and Nancy Quinn, his supervisor at Kidder. On September 17, 1991, petitioner filed a lawsuit in the 190th Judicial District Court of Harris County, Texas against Kidder and Quinn (the "First Lawsuit"). The First Lawsuit contained many of the same causes of action that were pleaded against respondents in this case. Quinn and Kidder filed an answer, subject to their motion to compel arbitration, based upon the same arbitration provision and exchange rules.

On January 31, 1991, the state court conducted a hearing on the defendants' motion to compel arbitration. Petitioner's attorneys were present and had an opportunity to present evidence and arguments on his claims about the validity and enforceability of the arbitration provision, including whether this provision was procured by fraud. At the conclusion of the hearing, the state court ruled that petitioner knowingly signed the arbitration agreement and ordered him to arbitrate all of his disputes against both Kidder and Quinn. The state court entered this order on its docket sheet. *See* Appendix A.

On February 6, 1992, petitioner filed a notice of nonsuit. In accordance with Tex. R. Civ. P. 162, which provides that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief," the state court signed and entered a formal order on March 3, 1992 reflecting its earlier ruling on defendants' motion. The court's order provides in relevant part:

> Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration is in all things

> GRANTED; and that plaintiff submit all his disputes, claims, and causes of action against defendants made the basis of this suit to arbitration pursuant to the terms of the signed arbitration agreement . . . signed by the plaintiff, and that further proceedings in this action be stayed pending the conclusion of the arbitration proceeding.

See Appendix B.

Despite the state court's orders, petitioner subsequently filed additional lawsuits against Kidder, Quinn, and GE based upon the same basic employment allegations he made in the First Lawsuit. Petitioner filed suit (the "Second Lawsuit") in state court against Quinn, asserting substantially the same allegations against her that were asserted in the First Lawsuit. The state court has recently dismissed the Second Lawsuit for want of prosecution.

Petitioner also filed another lawsuit (the "Third Lawsuit"), which is the one on appeal before this Court, against Kidder and GE. Many of the claims asserted against Kidder in the Third Lawsuit are the same as those that were presented in the First Lawsuit, and all arise out of petitioner's employment relationship with Kidder. Petitioner added GE as a party to this lawsuit in a blatant attempt to avoid both the arbitration agreement and the orders in the First Lawsuit. Plaintiff's only pled claim against GE is based factually on the arbitration agreement and legally upon RICO, and was the subject of GE's own Rule 9(b) motion.

Respondents subsequently filed a motion to compel arbitration and a motion to dismiss pursuant to Fed. R.

Civ. P. 9(b) and 11, which the district court granted on October 13, 1992.[1] The district court also sua sponte dismissed the case on collateral estoppel and other grounds:

> The poignant question, in the Court's view, is whether the plaintiff may circumvent the order of the state court by non-suit and refiling essentially the identical suit in state and federal court. In the Court's view, the plaintiff should not. As far as this Court is concerned, the spirit of the order entered in state court must be respected because the order was not arbitrarily entered. A full and fair hearing was granted and no complaint has been made here concerning the process. Because the issue of arbitration has been litigated, no useful purpose is served in permitting the plaintiff a second day in court. In this regard, *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985) [setting forth the elements of res judicata and collateral estoppel], is dispositive of this issue.
>
> For judicial economy and to preserve the integrity of the judicial process, the Court holds that this suit should be dismissed. *See Houston North Properties v. White*, 731 S.W.2d 719, 722 (Tex. App. – Houston [1st Dist.] 1987).

Order of Dismissal at D-3 of Petition for Writ of Certiorari (the "Petition").

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[1] The district court found GE's 9(b) motion, along with the other motions, "meritorious." Order of Dismissal, at D-1 of Petition. Petitioner did not appeal this part of the district court's decision. Accordingly, regardless of the Court's ruling on the Petition, the district court's dismissal of GE from the suit should be affirmed.

On appeal, the Fifth Circuit affirmed the district court's decision dismissing this case:

> The parties have already litigated the issue of arbitrability in state court. That court entered a valid order compelling arbitration. A federal court must give full faith and credit to state court orders; therefore, the district court did not err in dismissing [petitioner's] suit.

Opinion at B-7 of Petition.

REASONS THE PETITION SHOULD BE DENIED

I. Petitioner Failed to Raise in the Lower Court His Claim That His Seventh Amendment Rights Were Violated.

Petitioner claims that the arbitration provision at issue violated his "right to trial by jury under the Seventh Amendment to the United States Constitution." Petition at Question Presented No. 1. This question is the only constitutional issue raised by petitioner. Petitioner raised this issue for the first time on appeal in his Petition. He did not present this issue to the United States Court of Appeals for the Fifth Circuit.[2]

This Court should not ordinarily decide questions that were neither raised before nor considered by the

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[2] Petitioner did claim that he was entitled to a jury trial on the issue of whether the arbitration agreement was procured by fraud or was otherwise unenforceable. Petitioner never claimed to the Fifth Circuit that the arbitration agreement violated his Seventh Amendment rights, however.

court of appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (the Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1969); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition, but "not raised in the Court of Appeals" is "not properly before us"). Petitioner has not offered any compelling justification or excuse for failing to present this issue to the Fifth Circuit, such as a recent and unforeseen change in the law. Petitioner was represented by counsel at all stages of the appeal except the filing of this Petition. Accordingly, the Court should deny the Petition on the grounds that his Seventh Amendment claim is not properly before the Court.

II. Petitioner Failed to Raise Any Claims That Are Important or Special.

Petitioner has failed to raise any claims that are important or special to anyone other than the parties. Sup. Ct. R. 10.1. Petitioner does not claim in his Petition that the Fifth Circuit rendered a decision that conflicts with the decision of another federal court of appeals or a state court of last resort on these same issues. Sup. Ct. R. 10.1(a). Petitioner also does not claim that the Fifth Circuit departed from the accepted and usual course of judicial proceedings such that this Court's power of supervision is required. *Id.*

In fact, the Fifth Circuit decision affirming the district court's dismissal of petitioner's complaint against his former employer and enforcing the U-4 Form arbitration

provision comports with the decisions of this Court and other Federal circuit courts of appeal. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1657 (1991) (Form U-4 arbitration provision made claims under Age Discrimination in Employment Act by securities representative against employer arbitrable); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1050-54 (2d Cir. 1989) (former employee's post-employment claims against brokerage house arbitrable because of U-4 Form); *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987) (arbitration provision in U-4 Form made "false light" claims by employee against brokerage firm arbitrable); *McGinnis v. E.F. Hutton & Co., Inc.*, 812 F.2d 1011, 1013 (6th Cir. 1987) (a contractual duty to arbitrate "extends to non-brokers who sign U-4 agreements"); *Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 879 (9th Cir. 1992) (U-4 Form arbitration provision made claims for violations of the Employee Polygraph Protection Act arbitrable); *Hurst v. Prudential Securities, Inc.*, 1994 U.S. App. LEXIS 6940 at ¶ 10 (9th Cir. 1994) ("Courts have repeatedly found the Form U-4 to constitute a valid and enforceable agreement to arbitrate.") *See also Kaplan v. First Options of Chicago, Inc.*, 1994 U.S. App. LEXIS 5975, at ¶ 46 (3d Cir. 1994) (listing additional opinions in which federal courts have enforced U-4 arbitration provisions similar to petitioner's agreement).

At best, petitioner claims that both the district court and the Fifth Circuit misapplied Texas common law in concluding that petitioner was collaterally estopped from relitigating the enforceability of an arbitration provision. Petition at 4-9. Respondent contends that the Fifth Circuit correctly applied Texas law in affirming the dismissal of

petitioner's complaint. However, even if it did not, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Justice Harlan, *Manning the Dikes*, 13 Record of N.Y. Bar Ass'n., 541, 551 (1958). *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Because no important or special issues have been raised in the petition, the Court should deny the writ.

III. The District Court Did Not Violate Petitioner's Seventh Amendment Right to a Trial by Jury.

Petitioner was not denied his Seventh Amendment rights because these rights can be waived by signing a valid arbitration agreement. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993). The district court correctly found that in the First Lawsuit "[a] full and fair hearing was granted" on the validity of the arbitration provision and that "no complaint has been made here concerning the process." *See* Order of Dismissal at D-3 of Petition. Petitioner was represented by counsel during this hearing and was able to fully present his evidence. Petitioner does not dispute this finding in his Petition.

Moreover, in reviewing the district court's conclusions, the Court should not "indulge every reasonable presumption against waiver" of the right to a jury, as requested by Petitioner. Petition at 5. Quite the contrary,

the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25. *See also Explo, Inc. v. Southern Natural Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986) ("doubts as to the availability of arbitration must be resolved in favor of arbitration" in light of the "strong federal policy favoring arbitration"). *Accord Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (Federal Arbitration Act "requires that we rigorously enforce agreements to arbitrate").

The Court should review an order enforcing a state order compelling arbitration for abuse of discretion. *Dillard*, 961 F.2d at 1161 (cited by Fifth Circuit, Opinion at B-3 of Petition[3]). Because the state court found after an evidentiary hearing that the arbitration provision was valid and enforceable and that petitioner's claims were arbitrable, the district court did not abuse its discretion by dismissing petitioner's complaint.

IV. Petitioner Failed to Produce Sufficient Evidence to Require a Jury Trial on Arbitrability in Any Case.

Petitioner failed to produce sufficient evidence to require a jury trial on arbitrability. Petitioner "cannot obtain a jury trial merely by demanding one." *Dillard*, 961

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[3] Petitioner does not claim that the Fifth Circuit applied the wrong standard of review.

F.2d at 1154. Rather, the party "resisting arbitration bears 'the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act.' " *Id.* (quoting *Bhatia v. Johnston*, 818 F.2d 418, 422 (5th Cir. 1987)). At a minimum, petitioner "must produce at least some evidence to substantiate his factual allegations." *Id.*

In *Dillard*, 961 F.2d at 1154, the plaintiff also argued that he was entitled to a jury trial against his brokers, despite his having entered into an arbitration agreement. Like petitioner, the plaintiff in *Dillard* claimed that the arbitration provision was a contract of adhesion, violated the antitrust laws, and was unconscionable. *Id.* at 1154-55. Because the plaintiff, who was pro se, "failed to produce any evidence that the agreement to arbitrate was somehow unfair or oppressive," the appellate court affirmed the district court's dismissal of the plaintiff's claims. *Id.*

Despite being represented by counsel and already having had one trial on arbitrability, petitioner failed to produce *any* evidence to the district court supporting his claims that the arbitration provision is unenforceable, such as that Kidder and GE committed fraud in the " 'making' of the agreement to arbitrate." *Id.* at n.9 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967)).[4]

---

[4] Wheeler did provide the district court with an affidavit in which he claimed that he was "not aware that the [U-4] form contains an arbitration agreement" and that he "signed the U-4 without reading it." The Fifth Circuit has rejected this argument as "contrary to the universally prevailing rule that . . . one who executes a written contract is bound by its terms." *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th. Cir. 1980)

Petitioner has also not raised any new facts that were not presented or otherwise known at the time of the hearing in the First Lawsuit. Because he failed to produce evidence to substantiate his claims that the arbitration provision was unfair or oppressive, petitioner's complaint was correctly dismissed.

V. The Fifth Circuit Did Not Err in Its Application of Texas Law.

Petitioner's claim that the Fifth Circuit erred in applying Texas law to this case is incorrect in several respects.

A. The Fifth Circuit Correctly Decided That the Orders in the First Lawsuit Are Enforceable.

In its Order of Dismissal, the district court correctly found that the docket sheet in the First Lawsuit "reflects the order of the Court." Order of Dismissal at D-1 of Petition. The state court entered its original order on its docket sheet before petitioner took his nonsuit. *See* Appendix A. In the column of the docket sheet titled "General Order of Court," the state court found that there was a "hearing on discovery, dispute and arbitrability" and held "[c]ase ordered to arbitration." *Id.* The docket sheet order also describes the state court's subsequent March 3, 1992 order as being an "Order re 1/31/92 *Order*" (emphasis added). *Id.* The Fifth Circuit, after reviewing

---

(finding no evidence requiring jury trial on arbitrability where one party claimed that it did not read confirmation slips containing arbitration provision).

these facts, agreed with the district court that "the docket entry reflected a valid order of the court made at the hearing." Opinion at B-5 of Petition.

Petitioner claims that the Fifth Circuit and the district court erred in reaching this conclusion because the "oral rendition of a judgment supported by a court's docket sheet is insufficient for purposes of establishing a judgment." Petition at 7. However, the state court did not make an oral rendition of a judgment, but rather made a written order in the docket sheet. An order that "is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made," is enforceable. *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976) (cited by Fifth Circuit, Opinion at B-5 of Petition). *Accord Cluck v. Cluck*, 699 S.W.2d 246, 250-51 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.) ("A judgment is 'rendered' as of the date on which the trial judge declares in open court his decision on the matters submitted to him for adjudication, and oral pronouncement by the court of its decision is sufficient for rendition of judgment.").

In any case, the second order made by the state court on March 3, 1992 is also a valid and enforceable order. *See* Appendix B. Petitioner claims that the March 3, 1992 order is unenforceable because petitioner's nonsuit was taken prior to the court's entry of that order. Petition at 8. However, Texas Rule of Civil Procedure 162 provides that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Tex. R. Civ. P. 162 (Vernon 1994). A "claim for affirmative relief" includes more than just counterclaims. *See, e.g., Falls County v. Perkins & Cullum*, 798 S.W.2d 868,

871 (Tex. App. – Fort Worth 1990, no writ) (a request for attorney's fee in defendant's answer constitutes a claim for affirmative relief); *State v. Approximately $2,000,000 in United States Currency*, 822 S.W.2d 721, 726 (Tex. App. – Houston [1st Dist.] 1991, no writ) (claim in an original answer asserted claim for affirmative relief). Rather, a "claim for affirmative relief" is broadly defined as a defensive pleading seeking relief independent of plaintiff's claims. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990) (quoting *Weaver v. Jack*, 717 S.W.2d 654, 657 (Tex. App. – Waco 1986, writ ref'd n.r.e.).

Respondent's motion to compel arbitration met this standard by requesting a court order that plaintiff's claims against defendants be arbitrated and stayed pending arbitration. On its face, the docket sheet shows that the state court was aware that petitioner had nonsuited his claims before signing the second order. *See* Appendix A. The Fifth Circuit properly stated that it was not "convinced that the state court motion to compel arbitration was not properly regarded as a claim for affirmative relief," and therefore concluded that the March 3 order was valid and enforceable. Opinion at B-5 of Petition.

B. The Fifth Circuit Correctly Concluded That Petitioner's Nonsuit Did Not Affect the Validity of the Court's Orders in the First Lawsuit.

The Fifth Circuit correctly held that petitioner's "attempted nonsuit [under Tex. R. Civ. P. 162] cannot abrogate the effect of the state court's order compelling arbitration." Opinion at B-5 of Petition. The nonsuit provision found in Rule 162 should not be applied to "effect

injustice" or to "defeat the justice and right of the case." *Brightwell v. Rabeck*, 430 S.W.2d 252, 257 (Tex. Civ. App. – Fort Worth 1968, writ ref'd n.r.e.) (discussing the purpose of the Texas Rules of Civil Procedure). For example, the Texas Supreme Court has held that "[w]hether a discovery sanction survives a nonsuit depends upon the nature of the sanction involved." *Aetna Casualty & Sur. Co. v. Specia*, 849 S.W.2d 805, 806 (Tex. 1993). In *Specia*, the Texas Supreme Court favorably cited cases holding that the failure to enforce certain sanction orders after a Rule 162 nonsuit would thwart the purpose of deterrence because the litigant "would lose all incentive to stop, think and investigate more carefully before serving and filing papers." *Id.* at 807 n.3 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 389 (1990)). As discussed above, a Rule 162 nonsuit also does "not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Tex. R. Civ. P. 162. (Vernon 1994).

These limits on petitioner's right to nonsuit his claims must also be considered in light of the strong Texas and federal policies favoring arbitration. *Neal v. Hardee's Food Systems., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. App. – Dallas 1987, writ ref'd n.r.e.). Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, mandates that the courts enforce arbitration on issues as to which an arbitration agreement exists:

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such [agreement], or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable . . . .

The Federal Arbitration Act is binding, and a trial court has no discretion under the Act to refuse to compel arbitration pursuant to a valid arbitration agreement. *Price v. Drexel Burnham & Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986). As discussed above, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25.

The Fifth Circuit also properly considered petitioner's "right" to nonsuit a claim in which an arbitration order has been entered and file essentially the same suit in federal court in light of strong judicial principles of comity. Opinion at B-7 of Petition. Comity principles are flexible:

> Comity is a principle in which the courts of one state or jurisdiction will give effect to the laws or judicial decisions of another, not as a matter of obligation, but out of deference and respect. *Black's Law Dictionary* 242 (5th ed. 1979). To allow one court to intrude upon the orders of another is not in the interest of judicial economy and is inappropriate without concrete public policy concerns.

Keene Corp. v. Caldwell, 840 S.W.2d 715, 720 (Tex. App. – Houston [14th Dist.] 1992, no writ).

The Fifth Circuit's comity concerns about giving "full faith and credit to state court orders" are particularly strong in this case. As the district court observed, to allow petitioner to avoid an arbitration order in the First Lawsuit by taking a nonsuit would serve no useful purpose, threaten the integrity of the judicial process, run afoul of strong policies favoring arbitration, and be a

waste of judicial resources. Order of Dismissal at Petition D-1 to D-3. Indeed, during the scheduling conference, petitioner's lawyer conceded that the purpose of nonsuiting the First Lawsuit was to forum shop:

> The Court: If you go to court and get a result that you don't want, you cannot simply file another lawsuit just to keep doing it until you get what you want.
>
> Mr. Franklin: In the state of Texas, that's correct. But this was an interlocutory order and the order wasn't signed when it was nonsuited. And the cases are very clear. *They're absolutely clear that we have the right to do that.*

Transcript from Scheduling Conference at 7 (emphasis added).

In *Houston North Properties v. White*, 731 S.W.2d 719, 722 (Tex. App. – Houston [1st Dist.] 1987, writ dism'd), the court was faced with a similar situation when a party, among other things, "took a nonsuit . . . for the single purpose of seeking a more favorable forum." The court frowned on this tactic:

> This move to manipulate jurisdiction away from another district court is repugnant both to the rules of trial and appellate procedure, and to the spirit behind their enactment that dictates order and efficiency among courts with concurrent jurisdiction. This conduct is a threat to the independence and order of our judiciary. It must cease.

Id. See also Lamar Savings Ass'n v. White, 731 S.W.2d 715, 718 (Tex. App. – Houston [1st Dist.] 1987, no writ) (following the decision in *Houston North Properties*).

These fundamental principles of federal and Texas law favoring arbitration and the integrity of state court orders deserve the same protection from nonsuit abuse as do the sanction orders the Texas Supreme Court considered in *Specia*. The Fifth Circuit correctly applied these principles in concluding that "[t]he parties have already litigated the issue of arbitrability in state court," that the court in the First Lawsuit "entered a valid order compelling arbitration," that the "federal court must give full faith and credit to state court orders," and that "the district court did not err in dismissing [petitioner's] suit." Opinion at B-7 of Petition.

C. The Fifth Circuit Correctly Applied Texas Collateral Estoppel Principles.

The Fifth Circuit also recognized that Texas law on collateral estoppel requires that "a party must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action." Opinion at B-6 of Petition. *See also Jeanes v. Henderson*, 688 S.W.2d 100, 106 (Tex. 1985); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362 (Tex. 1971); Restatement (Second) of Judgments § 27 (1982). Petitioner does not dispute in his Petition that the Fifth Circuit correctly set forth the elements of collateral estoppel in Texas.

The Fifth Circuit then applied these principles to the facts surrounding the procedural history of the First Lawsuit. The court found that the validity of the arbitration

provision "was fully litigated in state court," that "the validity of the arbitration agreement was obviously the only issue relevant to the motion to compel arbitration," and that "the parties were identical and, therefore, cast as adversaries." Opinion at B-6 of Petition. Petitioner also does not dispute any of these conclusions in his Petition. It follows that the Fifth Circuit was correct in concluding that the state court orders in the First Lawsuit "precluded [petitioner] from relitigating the issue of the validity of the arbitration agreement." Opinion at B-7 of Petition.

Petitioner claims that the state court orders in the First Lawsuit are not "final judgments," however, and that "under Texas state law, a final judgment is required to establish res judicata and, hence, collateral estoppel." Petition at 7.[5] The Fifth Circuit properly rejected this argument and correctly stated that " 'finality' does not require a final judgment, but only that the issue has been 'fully litigated.' " Opinion at B-4 of Petition. *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-91 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, *and*

---

[5] In his Fifth Circuit brief, petitioner also claimed that the state court orders should not estop him in the federal case because he made new claims of fraud, illegality under the Sherman Act and RICO statute, waiver, and adhesion. However, the Fifth Circuit correctly found that "[c]ollateral estoppel precludes relitigation of issues, not claims" and that "new causes of action arising out of the same set of operative facts will also be precluded." Opinion at B-6 of Petition. *See Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex. 1982); *Benson*, 468 S.W.2d 361, 362 (Tex. 1971); Restatement (Second) of Judgments § 27 cmt. c (1982). Petitioner apparently concedes this point, since he has not complained in this Court about this part of the Fifth Circuit's opinion.

cert. denied, 460 U.S. 1013 (1983); Restatement (Second) of Judgments § 13 cmt. g (1982); *City of Bismarck v. Toltz, King, Duvall, Anderson & Assocs.*, 767 F.2d 429, 431 (8th Cir. 1985) ("[b]ecause the parties have had a full and fair opportunity to litigate the issue, the parties should not be allowed to relitigate" arbitrability because of collateral estoppel).

CONCLUSION

The decision of the Fifth Circuit, which the petitioner asks this Court to review, comports with the applicable decisions of this Court and the lower federal courts and correctly applies Texas law. There is nothing "special" or "important" under Rule 10 for this Court to consider. The petition for writ of certiorari should be denied.

Respectfully submitted,

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91-47995

19 0711

Filed 9-17- 1991

Wheeler, V M III

PLAINTIFFS

Attorneys

NATURE OF ACTION

Breach of Contract

vs.

Lizzie Peabody & Co Incorporated

DEFENDANTS

Attorneys

SURETIES ON COST BOND

Jury Fee Paid By

SETTINGS

19 General Order of Court

1-31-92 Hearing re Discovery dispute & Arbitrability. Case ordered to arbitration & to submit appropriate order;

2-12-92 Notice of Removal

3-2-92 Order re 1-31-92 Order

BEST AVAILABLE COPY

APPENDIX B

NO. 91-047995

V. M. WHEELER III, Plaintiff, v. KIDDER, PEABODY & CO. INCORPORATED, AND NANCY K. QUINN, Defendants.	§ § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 190TH JUDICIAL DISTRICT

ORDER

On the 2nd day of March, 1992, came on for hearing Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration and Defendants' Motion for Protective Order Quashing Plaintiff's Initial Discovery Requests. All parties appeared by and through their respective counsel. The Court, after considering the pleadings, affidavits, documents, and records filed by the parties, the relevant authorities, and the arguments of counsel, is of the opinion that Defendants' Motions are valid and should be GRANTED and it is, therefore,

ORDERED that Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration is in all things GRANTED; and that plaintiff submit all his disputes, claims, and causes of action against defendants made the basis of this suit to arbitration pursuant to the terms of the signed arbitration agreement contained in the uniform Application for Securities Industry Registration or Transfer (Form U-4) signed by the plaintiff, and that

further proceedings in this action be stayed pending the conclusion of the arbitration proceeding and

IT IS FURTHER ORDERED that Defendants' Motion for Protective Order Quashing Plaintiff's Initial Discovery Requests is in all things GRANTED, and that Plaintiff's First Set of Interrogatories, Request for Production and Requests for Admission is hereby quashed.

Signed this 2nd day of March, 1992.

/s/ Eileen O'Neill
JUDGE PRESIDING

APPROVED AS TO FORM
AND SUBSTANCE:

BAKER & BOTTS

BY _____

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APPROVED AS TO FORM ONLY:

_____

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APPENDIX C

LIST NAMING ALL PARENT COMPANIES AND SUBSIDIARIES OF RESPONDENTS KIDDER, PEABODY & CO. INCORPORATED AND GENERAL ELECTRIC CO.

1. *General Electric Company.*

   A. General Electric Co. does not have any parent corporations.

   B. The following companies are subsidiaries of General Electric Co.:

   General Electric Company
   G.E. Aircraft Engines
   Marine & Industrial Engines & Services Div.
   G.E. Appliances (A General Electric Co.)
   Roper Corporation
   RGE Corporation
   G.E. Capital Fleet Services (Operation of General Electric Corp.)
   G.E. Communications Services
   General Electric Information Systems Co.
   G.E. Electric Distribution & Control Manufacturing
   G.E. Industrial Power Systems
   G.E. Industrial & Power Systems Sales
   G.E. Nuclear Energy
   G.E. Power Delivery Division
   G.E.-Hitachi HVB, Inc.
   Bayou Cogeneration
   G.E. Lighting
   G.E. Toshiba Lighting Corporation
   G.E. Medical Systems
   G.E. Plastics
   G.E. Specialty Chemicals
   G.E. Plastics-America
   Plastics Manufacturing Div.
   Plastic Sales Div.

G.E. Silicones
G.E. Superabrasives
Silicone Products Div.
G.E. Trading Company
General Electric Supply Co. Div.
GE/Fanuc Automation North America
GE Transportation Systems
General Electric Financial Services, Inc.
Decimus Corp.
Employers Reinsurance Corp.
G.E. Capital Corporation
G.E. Capital Fleet Services
Building & Trailer Services
G.E. Capital McCullagh
Gelco Travel Services, Inc.
Creative Media
Gelco CTI Container Services, Inc.
Gelco Fleet Mngmt.
Gelco Fleet & Management Services Company
Gelco International Corp.
Gelco Space
TIP-Transport International Pool
G.E. Capital Vendor Financial Services
Eastman Kodak Credit Corporation
G.E. Capital Mortgage Services
General Electric Railcar Services Corp.
General Electric Railcar Repair Services Corp.
Kidder, Peabody Group Inc.
Polaris Aircraft Leasing Corporation
G.E. Environmental Systems
National Broadcasting Co., Inc.
CNBC
Patrick Media Group, Inc.
United Pacific Life Insurance Company

2. *Kidder, Peabody & Co. Incorporated*

   A. The parent company of Kidder, Peabody & Co. Incorporated is Kidder, Peabody Group Inc.

   B. Kidder, Peabody & Co. Incorporated does not own any subsidiaries that are not wholly-owned.

Supreme Court, U.S.
FILED
JUN - 6 1994
OFFICE OF THE CLERK

No. 93-1683

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

V.M. WHEELER III, Petitioner

v.

KIDDER, PEABODY & CO. INCORPORATED

and

GENERAL ELECTRIC CO., Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for the Petitioner,
Pro Se

QUESTIONS PRESENTED

1. Whether an arbitration provision, otherwise enforceable in accordance with the Federal Arbitration Act, specifically, 9 U.S.C.A. Section 2, is unenforceable and void for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment to the United States Constitution, U.S.C.A. Const. Amend. VII, when such provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract between parties far from equal in bargaining power, where such contract is presented to an officer of a corporation by his employer as a condition of his employment prior to any controversy arising, where there is no opportunity for the individual to negotiate over the terms of such contract, and where the individual has no choice other than to accept the contract as written.

2. Whether the lower courts erred in the application of Texas state law in dismissing petitioner's Federal suit on grounds of collateral estoppel and by applying the doctrine of res judicata to an interlocutory order of the Texas state court.

3. Whether the lower courts sanctioned a departure by the Texas state court from the accepted and usual course of judicial proceedings in its denial to petitioner of his statutory right to a jury trial on issues relating to the making of a purported arbitration agreement.

PARTIES TO THIS ACTION

The parties to these proceedings are the petitioner, V.M. Wheeler III, and the respondents, Kidder, Peabody & Co. Incorporated ("Kidder") and General Electric Co. ("GE").

A list naming all known parent companies and subsidiaries of respondents Kidder and GE appears as Appendix A.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. PARTIES TO THIS ACTION ii

III. TABLE OF AUTHORITIES iv

IV. STATEMENT OF THE CASE 1

V. PETITIONER'S REPLY TO RESPONDENTS' REASONS THE PETITION SHOULD BE DENIED 3

A. Issues Presented For Consideration By This Court 3

B. Prior Appeal Of The Seventh Amendment Issue 5

C. Important Or Special Claims Or Issues 6

D. District Court's Violation Of Petitioner's Seventh Amendment Right To Trial By Jury 6

E. Petitioner's Purported Failure To Produce Sufficient Evidence To Require A Jury Trial On Arbitrability 8

F. Court Of Appeals Error In Its Application Of Texas Law 9

VI. CONCLUSION 10

VII. APPENDICES

List Naming All Known Parent Companies And Subsidiaries Of Respondents Kidder, Peabody & Co. Incorporated And General Electric Co. ..... A

Order Of Reinstatement, Dated May 24, 1994, By The 190th Judicial District Court Of Harris County, Texas ..... B

TABLE OF AUTHORITIES

Cases

Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) 5
Hodges v. Easton, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882) 7
Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937) 7
Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) 7
National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977) 7
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) 7
Dillard v. Merrill Lynch, Pierce, Fenner & Smith, 961 F.2d 1148 (5th Cir. 1992) 8, 9
Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51 (3rd Cir. 1980) 8, 9
Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985) 9
Anglin Co., Inc. v. Arthur Tipps, 842 S.W.2d 266 (Tex. 1992) 10

Constitutional Provision

United States Constitution, Amendment VII 3, 4, 5

Statutes And Rules

Fed. R. Civ. P. 9(b) 2, 3
9 U.S.C.A. Section 1, et seq 4, 5, 6
9 U.S.C.A. Section 4 9
Tex. R. Civ. P. 162 9

STATEMENT OF THE CASE

Petitioner takes exception to several assertions in Respondents' statement of the case in their Brief In Opposition (the "Brief In Opposition").

First, while petitioner agrees that the lawsuit at issue in these proceedings (the "Federal Suit") is the third suit filed against various combinations of Kidder, GE and Nancy Quinn ("Quinn"), this lawsuit is the first suit filed by petitioner against Kidder and GE. *See,* Brief In Opposition, at 1, *where respondents claim that this suit is the third lawsuit filed by petitioner challenging the arbitration provision.*

Although petitioner challenged the arbitration provision in each of the suits referenced by respondents, neither of the two prior lawsuits originally sought affirmative relief with respect to the purported arbitration provision, and his pleadings with respect thereto in the prior two lawsuits constituted responses to efforts by the respective defendant(s) therein to shift the adjudicative forum to arbitration. Furthermore, the Federal Suit is distinct from the prior suits in that it includes claims not heretofore alleged against Kidder, GE or Quinn.

Respondents assert that each of the National Association of Securities Dealers, Inc., the New York Stock Exchange and the American Stock Exchange "has rules, constitutions, and by-laws that require petitioner's underlying dispute with respondents to be arbitrated." Brief In Opposition, at 1. Respondents' statement is immaterial to the issues presented by petitioner to this Court and presents a conclusion of law which has not yet been finally adjudicated in any legal proceedings.

Respondents state, "***In contravention of this arbitration agreement*** ..., petitioner filed three lawsuits against various combinations of Kidder, [GE], ... and Nancy Quinn ... " (Emphasis Added) Brief In Opposition, at 1-2. Respondents' statement presents conclusions of law on issues which have yet to be finally adjudicated.

Respondents state that, at the conclusion of the state court's hearing on the defendants' motion to compel arbitration in the first

lawsuit against Kidder and Quinn, "**the state court ruled that petitioner *knowingly* signed an arbitration agreement** and ordered him to arbitrate all of his disputes against both Kidder and Quinn." (Emphasis Added) Brief In Opposition, at 2.

While petitioner was not present at that hearing, he is unaware of any ruling that he "knowingly signed an arbitration agreement." Absent citation to some record of this ruling, reference by respondents to any ruling on petitioner's state of mind at the time of his execution of the purported arbitration agreement has been improperly placed before this Court.

Respondents assert that the state court dismissed the "Second Lawsuit" for want of prosecution. Brief In Opposition, at 3. The state court subsequently reinstated that lawsuit under an Order which ruled that the suit previously had been dismissed in error. (App. B)

Respondents declare, "Petitioner added GE as a party to [the Federal Suit] **in a *blatant attempt* to avoid both the arbitration agreement and the orders in the First Lawsuit**." (Emphasis Added) Brief In Opposition, at 3. Respondents' statement merely expresses their opinion and has not been proven before any court of law. This unfounded reference to Petitioner's purported state of mind has been improperly placed before this Court.

Finally, respondents state,

> The district court found GE's 9(b) motion, along with the other motions, "meritorious". Order of Dismissal, at D-1 of Petition. Petitioner did not appeal this part of the district court's decision. Accordingly, regardless of the Court's ruling on the Petition, the district court's dismissal of GE from the suit should be affirmed.

Brief In Opposition, at 4, Footnote 1.

Respondents' claim is without merit. In his brief to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"),

petitioner addresses this precise issue at great length. On Pages 23-26 of his Fifth Circuit brief, petitioner argues, in pertinent part,

> Although Judge Hoyt stated, in effect, that he had elected not to dismiss the Complaint against G.E. under RICO for failure to state a cause of action, the Order of Dismissal states that the District Court found G.E.'s motion to dismiss to be meritorious ... Doubtless no degree of specificity in pleading would be satisfactory to G.E. The motion to dismiss nevertheless ignored three qualifications to the particularity requirement of Rule 9(b) ... Even by the most strict interpretations of Rule 9(b), Wheeler's allegations outline the essential circumstances of fraud
> ...

Based upon the foregoing, it is clear that petitioner, in fact, did appeal this issue.

PETITIONER'S REPLY TO RESPONDENTS' REASONS THE PETITION SHOULD BE DENIED

A.
Issues Presented For Consideration By This Court

Respondents artfully avoid any response to the specific Seventh Amendment issue raised by petitioner and attempt to misdirect the attention of this Court to the broad question of the general enforceability of arbitration agreements.

Respondents submit that the issue before this Court is whether an arbitration provision in a Uniform Application For Securities Industry Registration Or Transfer Form U-4 violates petitioner's rights under the Seventh Amendment. Brief In Opposition, at (i). That question is quite different from the issue advanced to this Court by petitioner.

In his Petition, petitioner frames the issue before this Court,

> **Whether an arbitration provision,** ***otherwise enforceable in accordance with the Federal Arbitration Act,*** **... is unenforceable and void** for public policy as an unconstitutional waiver of the right to trial by jury under the Seventh Amendment ..., **when** such **provision constitutes one sentence of fine print among a multiple-page, standardized, pre-printed contract** between **parties far from equal in bargaining power, where** such **contract is presented** to an officer of a corporation by his employer **as a condition of** his **employment prior to any controversy** arising, where there is **no opportunity for** the **individual to negotiate over** the **terms** of such contract, and **where** the **individual has no choice other than to accept** the **contract as written**.

(Emphasis Added) Petition, at (i).

Petitioner's issue focuses on the ***validity and effectiveness of*** an individual's ***consent to*** a purported ***waiver of*** the ***right to jury trial, specifically*** when the purported ***waiver is buried in fine print among multiple pre-printed pages of a standardized contract*** between two ***parties far from equal in bargaining power*** and where the ***standardized contract*** is ***presented amidst a flurry of*** employment orientation ***documentation as a condition of employment following*** that individual's ***resignation from*** his ***prior employer*** and when the purported Constitutional ***waiver was neither bargained for nor discussed*** by the parties.

Petitioner's question specifically addresses the ***effectiveness and validity of consents to Constitutional waivers*** which are extracted from one party by another of far greater bargaining power when ***inadequate, at best, disclosure of*** the ***waiver, or the effects thereof,*** is made to the party against whom waiver is sought.

Petitioner states in his Petition,

> While ***Petitioner*** has never challenged, and ***does not challenge***, the Constitutionality of the ***Federal Arbitration Act***, ... the ***effectiveness of waivers*** of individuals' rights to jury trial ***which are properly obtained through*** the ***valid consent*** of parties against whom such waivers are sought to be enforced, or the ***validity of*** the ***purported contract as a whole***, Petitioner respectfully submits that the purported waiver of his right to jury trial in question in these proceedings falls far short of the ***Constitutional safeguards*** which have been adopted by this Court and other Federal courts of this land.

(Emphasis Added) Petition, at 6.

Clearly, respondents would rather focus this Court on the validity of arbitration provisions in the broad context of the Seventh Amendment where the jurisprudence affords great deference to arbitration agreements, in contrast to addressing the specific question presented by petitioner.

B.

Prior Appeal Of The Seventh Amendment Issue

Respondents argue that petitioner first raised the Seventh Amendment issue in his Petition. Brief In Opposition, at 5.

Petitioner respectfully submits that respondents again have attempted to divert the attention of this Court. While this Court is not precluded from considering issues first raised before it, *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), a review of petitioner's Fifth Circuit briefs demonstrates that petitioner addressed the issues of waiver and the right to jury trial in the lower courts. Many arguments by petitioner in his appeal focused on respondents' requirement to fully disclose the nature and character of the purported waiver and the effects thereof.

While the Seventh Amendment is not mentioned with specificity by petitioner's now deceased former counsel, respondents are well

aware that the issues surrounding the effectiveness of the purported waiver of the right to jury trial clearly formed an integral component of petitioner's argument to the Fifth Circuit.

C.
Important Or Special Claims Or Issues

Respondents submit that, "Petitioner has failed to raise any claims that are important or special to anyone other than the parties." Brief In Opposition, at 6.

Respondents' argument barely merits a reply. The question presented by petitioner to this Court involves a ***pre-printed, standardized contract*** which is ***required for execution by the "tens of thousands" of individuals*** professionally engaged in the securities industry in this country. Precisely what respondents would like to accomplish is to shift the attention of this Court from the fact that ***this issue is common to thousands of individuals*** either currently, or previously, employed by Kidder.

The issue in question is neither specific nor particular to petitioner, but, in fact, ***is important to all "registered" employees and former employees*** who are, or may become, ***subject to disputes with*** Kidder and/or other ***securities industry employers***. More broadly defined, ***the issue presented*** by petitioner to this Court ***impacts, or potentially impacts, every "registered" employee in this nation's securities industry***.

D.
District Court's Violation Of Petitioner's Seventh Amendment Right To Trial By Jury

Respondents note, "the Court should not 'indulge every reasonable presumption against waiver' of the right to a jury, as requested by Petitioner ... Quite the contrary, the Federal Arbitration Act establishes a 'liberal Federal policy favoring arbitration agreements.' ... Any 'doubts concerning the scope of arbitration issues should be resolved in favor of arbitration.'" Brief In Opposition, at 8-9.

Respondents' position is contrary to the decisions by this Court in *Hodges v. Easton*, 106 U.S. 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882), and *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937), where this Court held that courts must indulge every reasonable presumption against waiver of the fundamental right to trial by jury.

While petitioner agrees that there is substantial statutory authority and jurisprudence establishing a liberal Federal policy favoring arbitration agreements, the cases cited by respondents indicate that the issue to which this policy generally is applied focuses on the "availability" of arbitration and the "scope" of arbitrable issues, rather than on the effectiveness and validity of consents to waivers of the right to jury trial.

Respondents fail to cite any authority for the proposition that the "liberal Federal policy favoring arbitration agreements" supersedes, or reverses, the long-standing precedent that Constitutional waiver provisions are enforceable only if entered into knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986); *National Equipment Rental Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977) To so hold, this Court would have to reverse, or at least limit, its prior decision in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), where it refused to sustain a contractual provision which waived Constitutional rights when there was no showing that the parties against whom waiver was sought were aware, or made aware, of the significance of the fine print relied upon as a waiver of Constitutional rights.

The question before this Court is not whether the claims asserted by petitioner would be arbitrable under a valid arbitration agreement or whether the claims are within the scope of the purported arbitration provision. The issue is whether the purported arbitration provision is unenforceable and void for public policy as a result of respondents' failure to obtain ***valid and effective consent to a waiver*** of the fundamental right to trial by jury.

E.
Petitioner's Purported Failure To Produce Sufficient Evidence To Require A Jury Trial On Arbitrability

Respondents assert that "Petitioner failed to produce sufficient evidence to require a jury trial on arbitrability ... At a minimum, petitioner 'must produce at least some evidence to substantiate his factual allegations.'" Brief In Opposition, at 9-10.

Petitioner concurs that he, at a minimum, must produce "at least some evidence to substantiate his factual allegations." The requirement, however, is to produce "some evidence" and is not to prove, either beyond a reasonable doubt or by a preponderance of the evidence, that the "making" of the purported arbitration agreement is at issue. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith*, 961 F.2d 1148 (5th Cir. 1992); *Par-Knit Mills v. Stockbridge Fabrics*, 636 F.2d 51 (3rd Cir. 1980)

Petitioner was not present at the evidentiary hearing referenced by respondents. Petitioner did produce, however, his affidavit ("Petitioner's Affidavit") as to the circumstances surrounding his execution of the purported arbitration agreement.

Petitioner's Affidavit notes, in pertinent part,

> To the best of my recollection, I did not sign the Form U-4, Uniform Application for Industry Registration or Transfer, in the form that it was presented to the court ... At the time ... that I signed a U-4 Form for Kidder Peabody, I had no intent or contemplation that matters such as post-termination disputes between Kidder Peabody and myself ... could possibly be subject to arbitration under the terms of the U-4 Form. There was no discussion and I was never advised of the position with respect to arbitration set forth in Defendants' motion to stay this lawsuit and compel arbitration. My understanding of industry practice was that arbitration provisions are generally applicable to broker/dealer employees for the purposes of

requiring the employee's participation in ["customer-related" arbitration].

As respondents never have challenged the veracity of Petitioner's Affidavit, petitioner respectfully submits that he, in fact, did meet the standard required under 9 U.S.C.A. Section 4 for invoking a jury trial on the question of the "making" of the purported arbitration agreement and the validity thereof. See, *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866 (7th Cir. 1985); *Dillard*, supra; *Par-Knit Mills*, supra.

F.

Court Of Appeals Error In Its Application Of Texas Law

Respondents assert that their motion to compel arbitration meets the standards of a "claim for affirmative relief" under Texas state law, so as to preclude the effects of petitioner's nonsuit pursuant to Tex. R. Civ. P. 162 (Vernon 1994). Brief In Opposition, at 12-13. Even accepting, for the sake of argument, respondents' assertion as correct, while petitioner argues to the contrary in his Petition, it clearly would be manifestly unjust and unfair to permit respondents, on one hand, to prevent petitioner from invoking the jurisdiction of the courts for the resolution of his disputes, and on the other, to seek "affirmative relief" in a court of law.

Respondents state, "On its face, the docket sheet shows that the state court was aware that petitioner had nonsuited his claims before signing the second order." Brief In Opposition, at 13. Respondents fail to mention, however, that the "first order" of the state court could not have been a "final" order, and clearly must have been "preliminarily rendered" in anticipation of a formal written order, as the same entry on this docket sheet further provides that the state court expected the defendants to "submit [an] appropriate order" following such hearing.

Respondents further declare that petitioner's counsel conceded, during a scheduling conference in the Federal Suit, that the "purpose of nonsuiting the First Lawsuit was to forum shop". Brief In Opposition, at 16.

While the true intent of petitioner's attorney in nonsuiting petitioner's first suit probably never will be ascertained, as petitioner's counsel now is deceased, respondents claim constitutes an insulting extrapolation of the late Mr. Franklin's expression of his legal opinion that a party would have ***the right*** under Texas state law to nonsuit a case if the party goes to court and obtains an unwanted result. No mention is made by Mr. Franklin in the transcript from the scheduling conference in the Federal Suit of his specific intent with respect to the nonsuiting of petitioner's lawsuit against Kidder and Quinn.

Finally, respondents note that the Fifth Circuit properly rejected the argument that the state court orders in petitioner's suit against Kidder and Quinn were not "final judgments" under Texas state law. Brief In Opposition, at 18. The holdings of the authorities cited in the Petition are to the contrary, *Anglin Co., Inc. v. Arthur Tipps*, 842 S.W.2d 266 (Tex. 1992), and the "propriety" of the Fifth Circuit's decision is before this Court.

For all other issues raised by respondents in their Brief In Opposition, petitioner respectfully refers this Court to the arguments, and the authorities in support thereof, outlined in his Petition.

CONCLUSION

For the reasons stated above, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Counsel for the Petitioner,
Pro Se

APPENDIX A

List Naming All Known Parent Companies And Subsidiaries Of Respondents Kidder, Peabody & Co. Incorporated And General Electric Co.

1. *General Electric Co.*

   A. General Electric Co. does not have any parent corporations.
   B. The following companies are subsidiaries of General Electric Co.:
   General Electric Company
   G.E. Aircraft Engines
   Marine & Industrial Engines & Services Div.
   G.E. Appliances (A General Electric Co.)
   Roper Corporation
   RGE Corporation
   G.E. Capital Fleet Services (Operation of General Electric Corp.)
   G.E. Communications Services
   General Electric Information Systems Co.
   G.E. Electric Distribution & Control Manufacturing
   G.E. Industrial Power Systems
   G.E. Industrial & Power Systems Sales
   G.E. Nuclear Energy
   G.E. Power Delivery Division
   G.E. - Hitachi HVB, Inc.
   Bayou Cogeneration
   G.E. Lighting
   G.E. Toshiba Lighting Corporation
   G.E. Medical Systems
   G.E. Plastics
   G.E. Specialty Chemicals
   G.E. Plastics - America
   Plastics Manufacturing Div.
   Plastic Sales Div.
   G.E. Silicones
   G.E. Superabrasives
   Silicone Products Div.

G.E. Trading Company
General Electric Supply Co. Div.
GE/Fanuc Automation North America
GE Transportation Systems
General Electric Financial Services, Inc.
Decimus Corp.
Employers Reinsurance Corp.
G.E. Capital Corporation
G.E. Capital Fleet Services
Building & Trailer Services
G.E. Capital McCullagh
Gelco Travel Services, Inc.
Creative Media
Gelco CTI Container Services, Inc.
Gelco Fleet Mngmt.
Gelco Fleet & Management Services Company
Gelco International Corp.
Gelco Space
TIP - Transport International Pool
G.E. Capital Vendor Financial Services
Eastman Kodak Credit Corporation
G.E. Capital Mortgage Services
General Electric Railcar Services Corp.
General Electric Railcar Repair Services Corp.
Kidder, Peabody Group Inc.
Polaris Aircraft Leasing Corporation
G.E. Environmental Systems
National Broadcasting Co., Inc.
CNBC
Patrick Media Group, Inc.
United Pacific Life Insurance Company

2. *Kidder, Peabody & Co. Incorporated*

   A. The parent company of Kidder, Peabody & Co. Incorporated is Kidder, Peabody Group Inc.
   B. Kidder, Peabody & Co. Incorporated does not own any subsidiaries that are not wholly-owned.

NO. 92-25527

Wheeler, V.M. III	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
Quinn, Nancy K.	190TH JUDICIAL DISTRICT

ORDER

On May 24, 1994, it having been brought to the attention of the court that the above styled cause was dismissed for want of prosecution in error, it is therefore

ORDERED, ADJUDGED AND DECREED that this cause is reinstated on the COURT'S docket.

Signed May 24, 1994.

/s/ Eileen F. O'Neill
JUDGE PRESIDING